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Dean Allen and Gifford Allen v. Radium King Mines, Inc. : Appellants' Reply Brief

Utah Supreme Court

Harry E. Snow; Dayton Denious; Attorneys for Appellants;

IN THE SUPREME COURT
of the
STATE OF UTAH

DEAN ALLEN, and
GIFFORD ALLEN,

Plaintiff and Appellants

-v-

RADIUM KING MINES, INC., a Colorado Corporation; ULA URANIUM, INC., a Colorado Corporation, et al.,

Defendants and Respondents

Case No. 9194

APPELLANTS' REPLY BRIEF

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FORWARD

The Plaintiffs find it necessary to reply to the Defendants' brief because of Summary generalizations therein which are misleading because of their generality.

I.

. . The concession of lack of discovery on Fat Dog No. 6 requires a judgment for Plaintiffs as to that claim.

Respondents' brief in effect concedes that Plaintiffs should have been granted judgment at least to the area in conflict that is overlaid by Fat Dog No. 6. On page 30, it is acknowledged that there was no discovery as to Fat Dog No. 6 or any of the fractions, and the only answer advanced is, "so what," Plaintiffs had no possession and therefore cannot rely on this defect.

But, as to the area contained in Fat Dog No. 6 it is clear that Plaintiffs were at all times in possession until after the encounter of August 23, 1957 when the defendants by a show of force and threats of physical damage stopped the plaintiffs from reaching and developing their Hi Boy claims.

This encounter admittedly took place at the line of Fat Dog No. 5, according to Defendants' own witness (Tr. 378). See also the location of the encounter as marked on Defendants' Exhibit 10, (Tr. 196, 380). The Plaintiffs and equipment were working and present on Fat Dog No. 6 and proceeding to Fat Dog No. 5 in route to the Hi Boy claims to the North and West. Defendants Radium King were on Fat Dog No. 5 and in the area to the west of it. So as to Fat Dog No. 6 the Defendants make no argument that they had either discovery or possession, and they can make none.

II.

Absence of discovery as to all Fat Dog Claims in conflict is in effect conceded.

Lack of discovery is just as apparent, and just as conceded, as to Fat Dogs 4 and 5 as it is to the fractions and to No. 6 Fat Dog. These amended claims Fat Dog 4 and 5 have nothing in common with original claims Fat Dog 4 and 5 except that they have the same numbers.

No rear corners were ever found or established for the original Fat Dog claims, and it is entirely a matter of conjecture as to how they lay or how far they extend. The new claims can be considered amendments only insofar as they embrace the same ground. To what extent they do so, if at all, has not been shown and cannot be shown. Hence their only standing is as new claims, located by Mr. Shepherd, a surveyor who was surveying and concededly did not prospect and did not make or pretend to make any discovery whatsoever.

All this was pointed out in our opening brief (pp. 14 and 15). There is no answer to this position, and Defendants in their brief do not even attempt to make one.

III.

Plaintiffs' actual possession is not a matter of conflicting evidence but is shown by all the evidence.

The only real effort made by respondents to defeat Plaintiffs' rights is to put up a smoke screen on the question of actual possession. Here they may not rely on any finding of the court below because there is none. The mention of possession in the Memorandum Decision (R. 55)

clearly does not refer to actual possession since it refers to Franzen's possession. After his staking operation, whatever it was, Franzen never came back to the area except to prepare for the trial (Tr. 323). Hence there could be no finding of actual possession in Franzen, and the same is true as to Defendants.

The Allen's possession is clear, and Defendants' lack of possession equally clear. The Allen's were actually **on the ground** (Tr. 37), also with the Allenbachs as well as with engineers (Tr. 37, 146, 147). The Allens were physically present during the abortive Morrill survey (Tr. 144, 186, 190). No personnel or equipment of Defendants was on or headed for the conflicting claims until August 15, 1957, after the Allens had started their road building (Tr. 376, 381). All other road work by Defendants was for assessment purposes, or access to a spring; it was done on other claims and was not for the purpose of access to or control of Fat Dogs (Tr. 376, 408, 409).

As pointed out by Morrison, **Erhardt v. Borro**, 113-US 537, 5 Sup. Ct. 565, decided that after a prospector has discovered float or other indications and keeps diligently at work he has the right to be protected in his possession while following up such indications and will thereafter be protected to the full extend of his claim. **Morrison's Mining Rights** (16th Ed.) p. 26.

In **Cole v. Ralph** 25 US 286, 40 Sup. Ct. 321 (1920) Mr. Justice Van Devanter observes (p. 294) "an explorer in actual occupation and diligently searching for mineral is treated as a licensee or tenant at will and no right can be initiated or acquired through a forcible, fraudulent or clandestine intrusion on his possession."

This is the same rule recognized and applied in Utah in three cases cited in our opening brief:

Atherley v. Bullion Monarch Uranium Company, 8 Utah (2d) 362, 335 P. (2d) 71.

Eilers v. Boatman, 3 Utah 159, 167, 2 P. 66, 72, affirmed 111 U.S. 356, 357, 4 S. Ct. 432, 28 L. Ed. 454.

Kanab Uranium Corp. v. Consolidated Uranium Mines, 227 F. (2d) 434 (C.C.A. — 10, 1955.)

IV

THE HI BOY CLAIMS are the only duly and validly located claims in this case

We were wrong in our expectation, expressed in our opening brief (p. 10), that Defendants would not impose on this Court by pretending to attack our claims for lack of discovery or other supposed defects.

(A) There is no evidence of discovery in connection with the Fat Dog claims.

There is no evidence of any discovery by Franzen or Defendants. The contrast between the discovery work of the Allens and that of Franzen is so marked that Defendants cannot even argue about discovery without demonstrating that Franzen's locations, as well as Shepherd's were totally lacking any trace or token of discovery.

Note that Defendants' brief (in addition to conceding that Shepherd made no discovery, (p. 30) does not mention or claim any discovery work by Franzen (p. 29).

What Franzen did in the nature of discovery appears at Tr. 307-314. He had a geiger counter; the indication which he got was in the Chinle and, to use his expression, was "nothing to get excited about" (Tr. 313). The features in whch he was interested are utterly without significance: they were the facts that the Steen Mine had been discovered in the Chinle (Tr. 314) and certain surface indications which he referred to as "channels" or "scours" (Tr. 308-310). In other words, the only evidence of discovery is a geiger indication which was nothing to get excited about and the fact that there was a Chinle formation.

By Defendants' expert witnesses it is established that the significant formation is the Shinarump (Tr. 243, 244. This formation is many hundred feet under the surface at this point (Profile Map, Dfs. Ex. 11). Its presence and location are obviously not determined by surface indications but are indicated by drill hole information and proximity of known ore bodies, such as the Ula workings, Cog Minerals Mine and the mine on the Allen No. 2 (Tr. 243, 244, 245, 246, 247, 248). There is no outcrop which can be seen in this area (Tr. 249).

(B) The evidence establishing discovery of the Hi Boy claims is clear and undisputed.

The facts relied on for discovery for the Hi Boy Claims coincides with the testimony of Defendants' experts and with all requirements laid down in any of the decided cases.

At page 145 of their brief Defendants purport to summarize the evidence as to the Plaintiffs' discovery. This

is indeed a very misleading and inaccurate statement, particularly the portions which say that neither a scintillator nor a geiger counter was used and that the "only basis" for claiming discovery was observation of greenish color and the radiometric readings obtained by Nate Knight.

The prospecting for the Hi Boy Claims is detailed in the transcript (pages 134-144).

A scintillator was used (Tr. 134): a significant count was obtained (Tr. 135). At that particular time the claims could not be staked because the area was withdrawn (Tr. 136). When the area became available the precise spot where the claims should be located was determined on the basis of the prospecting just described plus other information available to the Allens, viz: the indication of the course of the Shinarump channel, as shown by tre Ula, Allen No. 2, and Cog Minerals workings (Tr. 136); the results of drilling done by Ula, particularly that done on Plaintiffs' own Allen No. 2 (Tr. 138); the advice of a geologist who checked the drilling cores (Tr. 129).

It should be noted that the Allens were thoroughly familiar with this area, having been in the vicinity forty or fifty times since 1953.

The Allens testified that they found copper mineralization on the claims. This is attacked because Dr. Williams did not find any copper. However, Dr. Flint acknowledged that the presence of copper on the Hi Boy Claims was possible (Tr. 401). Both Dr. Flint (Tr. 406) and Dr. Williams (Tr. 243, 249) testified that a reasonably informed and prudent person would proceed with expenditure of

time and money on the claims on the basis of the exact information on account of which the Plaintiffs located the Hi Boy Claims and proceeded with their efforts to develop the property.

Here is the test of discovery as laid down in the definitive case of **Rummell v. Bailey**, 7 Utah 2d 137, 320 P. 2d 653 (1958); " . . . With respect to just what indications of ore are necessary, it is to be kept in mind that in the instant case . . . the mineral which we are primarily concerned is uranium. It has the rare characteristic of being an unstable element . . . The 'radiation' therefrom may be detected by Geiger counters, scintillators and other radiometric instruments sensitive to it . . . We deem it entirely legitimate to rely upon such indications as one of the means of locating uranium . . . It need only be such as would lead a miner to pursue such indications with a reasonable expectation of finding ores . . . the correct doctrine is that there must be a discovery within the confines of the claim of same mineralization of a nature that has actual or potential value. It need not be of any particular assay or richness in quality, nor any specific amount in quantity, nor need it be sufficient that it would immediately pay mining expenses. The only essential is that the discovery must be of significance that a practical, experienced miner of prudence and judgment would deem it advisable to pursue the vein of 'lead' thus furnished and to expend further time, effort or money in attempting to develop the property as a mine."

It is clear that the Allen's discovery complies with all

the requirements of **Rummell v. Bailey.** It includes diligent prospecting, discovery of copper mineralization, use of a scintillator and the obtaining of a significant radiometric indication, the ascertainment and consideration of other factors deemed by experts and all reasonable men as indicating the presence of ore, such as nearby ore bodies, drill cores and projected course of a channel. Furthermore, both of Defendants' experts testified that on the basis of the facts discovered or learned by the Allens this was ground on which it was advisable to spend further time, effort and money in attempting to develop the property. On the other hand, while Franzen used a geiger counter he got no significant indication. The only other things he went on were the Chinle formation and things on the surface which he called scours or channels. If this is sufficient for a discovery then any claim can be validly located in the Chinle formation since you can always find scours and surface channels, and you can always get a count which is nothing to get excited about.

(C) THE HI BOY CLAIMS
are admittedly clearly marked
and properly located

Defendants' assertion of defects in the Hi Boy claims amounts to just another smoke screen. There is no substance to the contentions as to L shapes, extra sets of monuments, etc., etc. The accusation that the Hi Boy claims were possibly floated is demonstrably false and reveals the tendency of Respondents' brief to advance any arguments, regardless of their soundness.

(1) The contention that the Hi Boy claims were floated is false.

On page 19 Defendants state "there appears to be a floating or swinging of the Hi Boy Claims." They profess doubt as to whether the claims "were ever located on the ground." On page 32 Defendants suggest that the Hi Boy monuments "did not show up" until 1957.

We believe Defendants should not divert the time and energy of this court to consideration of such arguments since it is clear that the Allen monuments were placed in February, 1956 and have remained in place ever since. In Defendants' own brief (p. 18) Defendants point out that the surveyor, John Shepherd, observed Hi Boy monuments in May, 1956. Defendants' Exhibit 10 shows most of the original Hi Boy corners. This exhibit is one prepared by Mr. Shepherd from his survey notes. The fact that Mr. Shepherd found so many of the corners shows that they were clearly marked on the ground. Shepherd's mission was to survey the new Fat Dog Claims, not to look for Hi Boy monuments, and he testified that he "didn't spend any extra time looking" for Hi Boy corners (Tr. 273).

(2) The L shape does not impeach the Hi Boy claims (p. 17 the brief).

Defendants repeatedly assert that Plaintiffs did not realize that their claims were L shaped. It is true that they did not intend to lay out the claims in an L shape and that this shape is due to the fact that none of the corners on top of the Wingate can be seen from the Canyon and vice versa, and also none of the discovery monuments can be

seen from any of the corners, all as explained in our opening brief (p. 13).

The Defendants on page 25 of their brief make an issue of what they call "their sets of originals." Here, it appears that Mr. Newell's amended survey monuments (Plaintiffs' Exhibit No. 17), are also being used by Defendants to imply confusion in determining the area occupied by the Hi Boy claims.

The argument advanced by Defendants in connection with the Morrill survey and the rectangular claims proposed by Morrill is a specious argument. Exhibit 12 relied on for this argument shows that the original corners and monuments have always remained in the position where the surveyor Newell found them and shows clearly that the claims were L shaped and known to be such. Morrill proposed to lay out the claims as rectangles; such a rectangle would admittedly embrace considerable ground not within the boundaries of the claim as originally staked.

Gifford Allen indicated this fact by the red shading which appears on the proposed Hi Boy No. 1 (Ex. 12). Morrill's insistence that the claims would have to be swung in this fashion was a reason why the Morrill survey was never completed nor accepted (Tr. 218). The Plaintiffs at all times have been anxious to claim ground embraced by their original locations but have been equally anxious not to swing their claims or to assert a right to an area which they had not staked.

Defendants' Radium King, had their Exhibit 10 prepared in such a way as to indicate confusion in the corners

of the Allen claims. From this exhibit one would suppose that there was no way to distinguish the original corners from the ones proposed by Morrill. This is not true, however. The Morrill corners were marked as such and this was known to Dr. Flint (Tr. 189).

(3) The location notices adequately position the Hi Boy claims.

The contention that the claims are not in Red Canyon is a surprising argument in view of the fact Defendants' Franzen twice referred to the claims as being in Red Cnyon (Tr. 306, 336). But, as pointed out by Defendants themselves, location notices do not describe the claims as being simply in Red Canyon; they are described as being about a mile northerly of the Ula Camp in Red Canyon on top of the Wingate (Br. 38).

All the maps and all the testimony make it clear that this description will lead a person to the exact spot where the discovery monuments will be found. For example, see Tr. 246, Dfs. Exhibits 10, 16 and 17.

(4) **Leveridge v. Hennessy** is followed only in Montana.

The Montana case of **Leveridge v. Hennessy,** 135 P. 906 (1913) to which Defendants devote so much space may represent the law in Montana but it has no significance in Utah. Even if the case were applicable it would do Defendants no good because it would simply demonstrate that the Fat Dog Claims are void for failure to include the proper description.

The Montana Court was concerned with a variation of 100 feet in the south line and another variation of 432 feet. According to Franzen's testimony he was off 250 feet at one point (Tr. 332) and off 400 feet to 900 feet at another point (Tr. 356).

In every United States jurisdiction with the exception of Montana it is the law that a mining location is not rendered invalid by variation or descrepancy between the boundaries of the claim as marked on the ground and the courses and distances as described in the location notice or certificate. See 58 C. J. S. **Mines and Minerals**, Section 52, which shows that the **Leveridge** case represents a rule peculiar to Montana.

CONCLUSION

Plaintiffs' actual occupation of the ground up to the line of Fat Dog Claim No. 5 is undisputed and the lack of discovery as to Fat Dog No. 6 is conceded. Thus, it is indisputable that the lower court should have restored us to possession of the Hi Boy Claim as to the conflict with Fat Dog No. 6.

It is just as clear as a matter of law, however, that our possession of all this area in conflict continued regardless of continuous occupancy, and that we were entitled to protection against the intrusion of Defendants unless they could show a better right. Defendants have not shown a better right and have devoted themselves mainly to an attempt to deny our possession. Their claims are clearly void for lack of discovery and in any event they are subsequent and junior to the Hi Boy Claims.

Plaintiffs showed valid claims supported by due discovery coupled with actual possession and a diligent effort to develop the property. Defendants on the other hand rely on their superior financial resources (Br. 10) and apparently still follow the policies explained by their Mr. Hutchins: "We are in the business of mining ore, and if ore is there and we think it's valuable property, we try to

get them in and sweat them out and get the property as cheap as we can." (Tr. 372)

Judgment should be reversed and the lower court should be directed to enter judgment in favor of Plaintiffs.

Respectfully submitted,

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